

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
*See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.*

**FILED BY CLERK**

**OCT 19 2010**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0143-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
STEVE ALLEN LYMAN,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20050552

Honorable Robert Duber II, Judge

REVIEW GRANTED; RELIEF DENIED

Law Office of Emily Danies  
By Emily L. Danies

Tucson  
Attorney for Petitioner

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ECKERSTROM, Judge.

¶1 Following a jury trial, petitioner Steve Lyman was convicted of possession of a dangerous drug and possession of drug paraphernalia. The trial court sentenced him to concurrent, presumptive prison terms, the longer of which was ten years. This court affirmed his convictions and sentences on appeal. *State v. Lyman*, No. 2 CA-CR 2006-0277 (memorandum decision filed Nov. 7, 2007). Lyman then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting that trial counsel, Gary Scales, was ineffective in failing to explain the benefits of the plea agreement the state had offered before trial. Following an evidentiary hearing at which Lyman and Scales testified, the trial court denied post-conviction relief. In this petition for review, Lyman asks that we order the original plea offer be reinstated. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶2 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). An attorney’s failure to give accurate advice or information necessary to allow a defendant to make an informed decision whether to accept a plea agreement constitutes deficient performance. *See State v. Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d 1193, 1200 (App. 2000).

¶3 At the evidentiary hearing, Lyman testified that although Scales had discussed the plea agreement with him, he had not informed him of the potential sentence he could receive after a trial. Lyman additionally testified that Scales had told him they “stood a chance on winning.” Lyman explained that although he had pled guilty in other matters, he did not do so here because he was innocent and because he believed he would face, at most, a 3.75-year prison term at trial, in contrast to the 2.5-year presumptive term in the plea agreement. Notably, when asked if Scales had ever told him he was facing a potential 3.75-year term at trial, Lyman responded, “I don’t recall that he did.” Lyman additionally testified that he would not have gone to trial if he had understood he might receive a ten-year term. In Lyman’s affidavit, which was filed as a supplement to his petition for post-conviction relief, he attested, *inter alia*, that Scales had “never discussed that [Lyman’s] prior convictions could be used to give [Lyman] a 10 year sentence.”

¶4 In contrast, Scales testified that he had “absolutely” informed Lyman he could receive a presumptive ten-year prison term if he were convicted at trial; discussed the plea agreement with Lyman “on numerous occasions”; provided Lyman with a copy of the plea agreement; reminded him “what his exposure with his prior convictions [was]” and that the worst sentence he faced under the plea agreement was 3.75 years; and informed Lyman there was “plenty of proof” against him. Scales testified as follows:

I have to tell you that as far as I am concerned, there was no confusion. I was very specific about the actual number of years we were looking at.

Because it was in my view . . . an extremely favorable plea for him. And the exposure if we went to trial and he were convicted so extreme.

So I was very, very careful to make sure that he understood that we were really, really looking at some significant time in prison if he were convicted.

I wanted to make sure, absolutely sure that he understood that. And that he understood the benefits of the plea that was offered . . . at the time.

Scales also testified that Lyman had told him he was not interested in accepting a guilty plea and did not want to go to prison. Scales's affidavit, which the state attached as an exhibit to its response to the petition for post-conviction relief, essentially summarized the testimony Scales provided at the hearing.

¶5 After hearing testimony from both Lyman and Scales, the trial court made the following findings at the evidentiary hearing:

This is truly a credibility question. The defendant[has] plead[ed] guilty before.

He has taken pleas in that regard. He's sophisticated enough to understand. I know he was presented with a plea agreement.

I know that the original indictment had allegations which . . . of necessity would have to have been dismissed.

The discussions about aggravated circumstances would have had to have included some consideration of the fact that counts or allegations of enhancing provisions would have been dismissed.

I find it unlikely that it would have transpired as the defendant testified.

¶6 As the finder of fact, the trial court was in the best position to assess the credibility of the witnesses' testimony, as it did here. *See State v. Olquin*, 216 Ariz. 250,

¶ 10, 165 P.3d 228, 230 (App. 2007). Therefore, we defer to that assessment. *See State v. Estrada*, 209 Ariz. 287, ¶ 22, 100 P.3d 452, 457 (App. 2004).

¶7 Because we conclude the trial court did not abuse its discretion by denying post-conviction relief, we grant the petition for review but deny relief.

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge